THE EFFECT OF AN OVERRULING DECISION UPON ACTS DONE IN RELIANCE ON THE DECISION OVERRULED. — A recent Mississippi case raises a question which tests the soundness of an old and respected theory of the common law. The court there refused to give a change of its construction of a criminal statute a retroactive effect on the prior acts of the defendant, which the court had pronounced innocent at the time he committed them. *State* v. *Longino*, 67 So. 902.[1] The decision went partly on the ground that the conviction of the defendant under such circumstances would violate the constitutional prohibition of cruel and unusual punishments. But that reason seems clearly unsound;[2] and a broader ground, on which the court also relied, must be taken to justify the result.

According to the orthodox theory of Blackstone, which still claims at least the nominal allegiance of most courts, a judicial decision is merely evidence of the law, not law itself; and when a decision is overruled, it does not become bad law; it never was law, and the rule announced in the later case has been the law all the time.[3] But where in reliance on the earlier decision men have acquired contract or property rights which are valid under the law as then declared by the highest court of the state, or have done acts which according to that law are innocent, as in the principal case, the logical outcome of this doctrine would often cause great hardship and injustice. When confronted by this situation, however, the great majority of the courts have refused to go the whole length of the doctrine, but have made a so-called exception to it.[4]

The question has most often come up in cases involving contract rights. In a series of cases in which state courts had held statutes au-

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ity has been reached in a suit by the Attorney-General. D. R. Wilder Mfg. Co. *v.* Corn Products Refining Co., 236 U. S. 165; see 28 HARV. L. REV. 691. An analogous interpretation of the Clayton and Trade Commission Acts involves no further step. If individual redress with threefold damages, specifically provided for in the Sherman Law, is predicated upon the determination of illegality in a government suit, the relief granted by Section 16 of the Clayton Act can be interpreted as dependent upon the establishment of unlawful practices by the Trade Commission. This construction is aided by the consideration that the Clayton Act provides that facts established in Trade Commission suits shall be *primâ facie* evidence in private actions based thereon. It is an important distinction, however, that an individual may sue before the Interstate Commerce Commission, while he has no such standing before the Trade Commission. Legislation giving him such standing would clearly warrant an extension of the rule of the Abilene case to suits under the Clayton Act.

[1] This case is more completely stated in this issue of the REVIEW, p. 103.

[2] As was pointed out by Weaver, J., in State *v.* O'Neil, 147 Ia. 513, 535, 126 N. W. 454, 461, this prohibition is directed against excessive or unreasonable punishment after it is assumed that the defendant is guilty. In the principal case the statutory penalty was imprisonment for not more than five years, for receiving a bank deposit while having good cause to believe the bank insolvent. That can hardly be called an unreasonable punishment if it is assumed that the defendant is guilty of the crime, which is in fact the point at issue. For further discussion of this constitutional provision, see 24 HARV. L. REV. 54; COOLEY, CONSTITUTIONAL LIMITATIONS, 471; WATSON, CONSTITUTION, 1510.

[3] 1 BL. COM. 68–71. See Harbert *v.* Monongahela River R. Co., 50 W. Va. 253, 255, 40 S. E. 377, 378; Storrie *v.* Cortes, 90 Tex. 283, 291, 38 S. W. 154, 158.

[4] See Center School Township *v.* State, 150 Ind. 168, 173, 49 N. E. 961, 963, where the court said that though in general a change in judicial decision had a retrospective effect, the courts would not apply it so as to impair vested rights such as property rights or those resting on contracts. See also cases cited in note 9.

thorizing the issuance of municipal bonds constitutional at the time the bonds were put on the market, but had afterwards reversed themselves and held the statutes unconstitutional, the Supreme Court, in upholding the validity of the bonds, enunciated the rule that a change in the judicial construction of a statute by a state court would be given a prospective and not a retroactive effect in its operation on contracts which when made were valid under the law as then expounded by the state court.[5] In a later case the court applied the same rule to a change in the position of a state court on a common-law question.[6] From the language of the municipal bond cases it seems that the Supreme Court then felt that to give the overruling decision a retroactive effect would violate the constitutional provision against impairing the obligation of contracts.[7] But it seems no longer possible to rest these municipal bond cases on the constitutional ground, since later decisions have established that the prohibition against the impairment of contracts applies only to legislative acts and not to judicial decisions.[8] State courts are, therefore, free to give an overruling decision a retroactive effect in regard to vested rights and no appeal lies to the Supreme Court; but most of the states have held nevertheless that as to contract and property rights the change in decision does not operate retrospectively.[9]

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[5] Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175; Thomson *v.* Lee County, 3 Wall. (U. S.) 327; Olcott *v.* Supervisors, 16 Wall. (U. S.) 678; Douglass *v.* Pike County, 101 U. S. 677; Taylor *v.* Ypsilanti, 105 U. S. 60; Louisiana *v.* Pilsbury, 105 U. S. 278. In Douglass *v.* Pike County, *supra*, p. 687, Waite, C. J., said: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive."

[6] Muhlker *v.* Harlem R. Co., 197 U. S. 544. A statute directed a railroad in the street in front of the plaintiff's premises to elevate its tracks, and the state court refused the plaintiff compensation, overruling a previous case which declared that abutting property owners had an easement of light and air in the street through contracts with the city, arising when they conveyed the fee of the street to the city solely for street purposes. The Supreme Court took jurisdiction on a writ of error to the state court on the ground that the statute impaired the obligation of the plaintiff's contract and the court in determining what that obligation was considered only the law as declared by the state court at the time plaintiff acquired his property. Fuller, C. J., White, Peckham, and Holmes, JJ., dissented. For discussion of this case, see 19 HARV. L. REV. 67; 9 COL. L. REV. 163.

[7] Waite, C. J., in Douglass *v.* Pike County, 101 U. S. 677, 687: "We cannot give them [the later decisions] a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing."

[8] Central Land Co. *v.* Laidley, 159 U. S. 103; Bacon *v.* Texas, 163 U. S. 207; Turner *v.* Wilkes County Commissioners, 173 U. S. 461. This construction seems justified by the wording of CONST., Art. 1, Sec. 10 [1]: "No State shall *pass* any . . . law impairing the obligation of contracts." It is difficult to reconcile these cases with Muhlker *v.* Harlem R. Co., 197 U. S. 544, 570.

In Bacon *v.* Texas, *supra*, at p. 220, the court distinguishes the municipal bond cases on the ground that the Supreme Court has jurisdiction, on writ of error to a federal court following the later decision of a state court, to reverse for misconstruction of the state statute, whereas it has "no jurisdiction to review a judgment of a state court made under precisely the same circumstances." See also Central Land Co. *v.* Laidley, *supra*, at p. 111.

[9] Farrior *v.* Security Co., 92 Ala. 176, 9 So. 532; County Commissioners *v.* King, 13 Fla. 451; Hasket *v.* Maxey, 134 Ind. 182, 33 N. E. 358; Stephenson *v.* Boody, 139 Ind. 60, 38 N. E. 331; Harris *v.* Jex, 55 N. Y. 421; Hill *v.* Brown, 144 N. C. 117, 56 S. E. 693; Menges *v.* Dentler, 33 Pa. St. 495; Geddes *v.* Brown, 5 Phila. 180; Herndon

In criminal cases the question of the effect of an overruling decision upon one who acted in reliance on the earlier decision has seldom arisen. The few previous cases that have decided the point are in accord with the principal case.[10] The result there reached was obviously just, and, it is submitted, was also correct on principle.[11] Although it is settled that the constitutional prohibition of *ex post facto* laws, like the provision against impairing the obligation of contracts, prevents only legislative acts and not judicial decisions,[12] the courts, following a perfect analogy, should not allow an overruling decision to operate retroactively, wherever a statute could not do so.[13] It is quite as unjust for the court to declare that a certain act is innocent, and after a man has committed it relying on that decision, to tell him that the court was mistaken and that he is a criminal, as it is for the legislature to pass an *ex post facto* statute declaring a man a criminal for an act that he has previously done.[14] "Parties are presumed to know the existing law, but not to know the law better than the courts, or to know what the law will be at a future day." [15] The courts do in fact make law; [16] a decision is law until it is overruled,[17] and

v. Moore, 18 S. C. 339; State *v.* Mayor, 109 Tenn. 315, 70 S. W. 1031; Vermont & C. R. Co. *v.* Vermont Central R. Co., 63 Vt. 1, 21 Atl. 262. *Contra:* Allen *v.* Allen, 95 Cal. 184, 30 Pac. 213; Stockton *v.* Dundee Mfg. Co., 22 N. J. Eq. 56; Storrie *v.* Cortes, 90 Tex. 283, 38 S. W. 154. See discussion in 15 HARV. L. REV. 667.

In most jurisdictions in civil cases this rule is limited to vested rights accruing before the overruling decision. In the following cases the court held the parties had acquired no vested rights and therefore the later decision operated retroactively in regard to them even though they had done some act in reliance on the earlier decision. Center School Township *v.* State, 150 Ind. 168, 49 N. E. 961; Gross *v.* Whitley County Commissioners, 158 Ind. 531, 64 N. E. 25; Mountain Grove Bank *v.* Douglas County, 146 Mo. 42, 47 S. W. 944; Lewis *v.* Symmes, 61 Oh. St. 471, 56 N. E. 194.

[10] State *v.* O'Neil, 147 Ia. 513, 126 N. W. 454; State *v.* Bell, 136 N. C. 674, 49 S. E. 163. See State *v.* Fulton, 149 N. C. 485, 492, 63 S. E. 145, 147. In Lanier *v.* State, 57 Miss. 102, there is a *dictum* that "the doctrine of *stare decisis* in criminal cases cannot allow violators of the law a vested interest in previous rules erroneously sanctioned." In the O'Neil case the court was unanimous in the result, but followed three different lines of reasoning in reaching it.

[11] The principal case expressly limited its decision to situations involving a change of statutory construction. No criminal case involving an overruled decision on the common law has been found where this point was decided, but it is submitted that there is no logical distinction between the two cases and that none should be made. In both situations the defendant should equally be protected.

[12] Ross *v.* Oregon, 227 U. S. 150.

[13] See 18 YALE L. J. 422 for a suggested distinction between the treatment of acts *mala prohibita* and acts *mala in se* in this regard. It is submitted that such a distinction is purely historical and arbitrary, and should not be attempted. All acts alike should be protected if done while the court pronounced them innocent. As a matter of fact, it will rarely happen that any court will declare innocent an act which could be classified as *malum in se*.

[14] In regard to the impairment of contracts by change of decision, see article in 23 AM. L. REV. 190.

[15] Farrior *v.* Security Co., 92 Ala. 176, 181, 9 So. 532, 533.

[16] See article by Ezra R. Thayer in 5 HARV. L. REV. 172; article by C. J. Bonaparte in 23 GREEN BAG 507; GRAY, THE NATURE AND SOURCES OF THE LAW, §§ 489, 492, 494, 506, 508, 540–542.

[17] We are considering primarily the operation of the overruling decision which would make prior acts criminal. If before a defendant's act the court had held it criminal, and later overruled the earlier decision and held the act innocent, the defendant should not be punished. The retrospective operation of the second decision in that case would not be *ex post facto*, and a statute could be given a similar retrospective force. An overruling decision should be treated the same as a statute which purports to oper-

the ancient fiction that decisions are only evidence of the law should be discarded. It is significant that in nearly every case where that fiction conflicts with obvious justice, the courts are disregarding it and reaching the just result; [18] that they are more and more coming to acknowledge that they do make law [19] and to act on that principle.

IS A CHANGE OF JUDGES IN THE COURSE OF A CRIMINAL TRIAL UNCONSTITUTIONAL? — The words of Mr. Justice Holmes in *Kepner* v. *United States*,[1] "there is to-day more danger that criminals will escape justice than that they will be subjected to tyranny," seem to be justified once more by the recent decision of the Circuit Court of Appeals, Second Circuit, in *Freeman* v. *United States* (not yet reported). In that case the defendant was being tried for a statutory misdemeanor. The presiding judge became ill in the middle of the trial, and another was appointed to take his place, with the express assent of the defendant. The court held that the substitution was a violation of the defendant's inalienable right of trial by jury, a right which he could not waive. With all deference, the opinion is not as convincing as one could wish. It is mostly a resumé of cases, with some stress laid on *Crain* v. *United States*,[2] which was expressly overruled by the Supreme Court two years ago.[3]

The decision raises the old question of the meaning of the provisions of Article III, Section 2, Clause 3, as explained or modified by the Sixth Amendment.[4] By the rules of constitutional construction, "trial by jury" is given the meaning it had in England when the Constitution was framed, that is, trial by a jury of twelve men, presided over by a court.[5] There seems, however, to have been no common-law rule that the judges must remain the same throughout the trial.[6] The question has

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ate retrospectively. It may do so in all cases except where it would impair contract or property rights or make innocent acts criminal; but the overruled decision should be the law to govern all vested rights acquired, and all acts which it declared innocent, committed before its reversal.

[18] See cases cited in notes 5, 9, and 10.

[19] Holmes, J., *dis.*, in Kuhn *v.* Fairmont Coal Co., 215 U. S. 349, 371: "That fiction [that courts only declare the law] had to be abandoned and was abandoned when this court came to decide the municipal bond cases. In those cases the court followed Chief Justice Taney . . . in recognizing the fact that the decisions of the state courts of last resort make the law for the state. The principle is that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of law. . . . Whatever it [the law of the state] is called it is the law as declared by the state judges and nothing else."

[1] 195 U. S. 100, 134.

[2] 162 U. S. 625.

[3] Garland *v.* Washington, 232 U. S. 642, 647.

[4] "The trial of all crimes, except in cases of impeachment, shall be by jury." CONST., Art. III, Sec. 2, Cl. 3. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury; . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense." Amendment VI.

[5] 1 HALE, PLEAS OF THE CROWN, 33; See Lamb *v.* Lane, 4 Oh. St. 167, 179; Capital Traction Co. *v.* Hof, 174 U. S. 1, 13.

[6] The opinion practically admits this, as Rogers, J., says: "An examination of the cases in the English courts discloses no warrant for believing that a substitute of judges